Conkle Funeral Home, Inc. *and* Furniture, Department Store & Parcel Delivery Drivers & Warehousemen of Local Union No. 193, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 25-CA-13828 and 25-CA-14113

March 1, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 24, 1982, Administrative Law Judge Irwin Kaplan issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge: These consolidated cases were heard in Indianapolis, Indiana, on April 1, 1982. The underlying charges were filed by Furniture, Department Store & Parcel Delivery Drivers & Warehousemen of Local No. 193, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the Union), which charges gave rise to an order consolidating cases, complaint, and notice of hearing on January 6, 1982, alleging the Conkle Funeral Home, Inc. (herein Respondent), engaged in conduct violative of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (herein the Act).

The essence of the 8(a)(5) allegation is that Respondent wrongfully and unlawfully relied on the Union's disclaimer of interest during the certification year to refuse to recognize and bargain with the Union when said Union subsequently demanded renewed bargaining but still during the certification year. It is also alleged that Respondent, through its personnel manager, E. D. Lashbrook, independently violated Section 8(a)(1) of the Act by unlawful interrogation, creating the impression to employees that their union activities were under surveillance, and offering to adjust grievances and improve benefits if the employees abandoned their membership and support of the Union. Further, it is alleged that Respondent, through its representative, Rayford T. Blankenship, in conducting employee interviews in preparation for hearing, failed to comport with the guidelines set forth by the Board in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), and its progeny and that Respondent thereby additionally violated Section 8(a)(1) of the Act.

Respondent's answer conceded *inter alia* jurisdictional facts but denied all allegations that it committed any unfair labor practices.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the post-hearing briefs, I find as follows:

I. JURISDICTION

Respondent is an Indiana corporation engaged in the business of operating a funeral home and mortuary and in performing related services. It has maintained its principal office and place of business in Indianapolis, Indiana. During the past year, a representative period, in connection with the aforenoted business operations, Respondent has derived revenue in excess of $50,000 directly from points located outside the State of Indiana. It is admitted, and I find, that Respondent is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted, and I find, that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

During the week of September 17, 1980, employee Dick Lotts phoned Edward Elder, secretary-treasurer and business agent of the Union, and invited him to organize Respondent's employees. The Union's organizational drive culminated in a successful election which was conducted October 27, 1980 (G.C. Exh. 2), and the issuance of a Certification of Representative on November 4, 1980.[1] After the Union submitted a proposal and after an exchange of correspondence the parties finally met on December 29 and conducted their first negotiating ses-

[1] The certified unit is as follows: All full-time and regular part-time licensed embalmers employed by the employer at its Indianapolis, Indiana, facility, but excluding all office clerical employees, all professional employees, all technical employees and all guards and supervisors as defined in the Act. (G.C. Exh. 3).

sion. Subsequently, the parties conducted another five or six bargaining sessions, the last of which was held on April 2, 1981,[2] when Respondent made its final offer.

On or about April 8, Elder met with employees Grogg, Krugman, Sexton, and Followell and presented Respondent's final offer for their consideration.[3] Elder recommended that the members ratify the contract, characterizing it as a good contract although he acknowledged that it was not everything the employees wanted. He noted *inter alia* that the employees were offered a 31-cent-per-hour wage increase and that they would retain many of the fringe benefits they enjoyed previously. Elder also pointed out that Respondent is the first employer in the funeral home industry in the State of Indiana to be organized and as such the contract represented a good beginning. The membership refused to ratify the contract but instructed Elder that if Respondent agreed to certain changes they would then accept Respondent's offer.[4] A fews days later Elder contacted Respondent's attorney Robert Lutz by phone and told him that the membership had rejected Respondent's package as offered but that the parties had a contract if Respondent accepted the changes proposed by the employee-members. Within the next several days, Lutz contacted Elder and told him that Respondent was unwilling to make any changes from his final offer and that there was no further room for discussion. Elder again met with the employee-members, 2 or 3 days later, to advise them that Respondent refused to budge from its final offer and that the parties had reached a bargaining impasse. He then outlined several options open to them including setting up an informational picket line. The members decided on an informational picket line but only if staffed by other members of the local union, not Respondent's employees.[5] Elder again presented Respondent's final offer and again the membership turned it down as unacceptable.

In April, and a few days after Elder initially recommended that the employees ratify the contract, Floyd Grogg met with three fellow embalmers and they explored the possibility of bargaining with the Company on their own and eliminating the Union as their representative.[6] Grogg then called Respondent's attorney Robert Lutz and complained that the employees were not happy with the Union and were contemplating asking it to release them and to request that management negotiate with them directly. According to Grogg, Lutz was not receptive to the proposal and told him, *inter alia*, that there was ill feeling between management and the embalmers. In any event, Lutz pointed out that in his opinion he did not think the employees could legally eliminate the Union because it was certified for a year. Lutz tried to dissuade Grogg taking any action against the Union immediately suggesting that he wait awhile and let things cool off. Grogg told all the other employees of his conversation with Lutz and they decided to ask the Union not to represent them any further. Grogg testified that he called Lutz a day or two later and told him that the embalmers were going to "chuck the Union" and conveyed his desire to negotiate directly with management. Lutz reiterated what he had told Grogg earlier, to wit, that he did not think the employees could legally get rid of the Union during the certification year and that would not come to pass until November. Grogg disagreed and told Lutz that the employees were still going to try to get rid of the Union.

On or about April 17 Grogg, Krugman, and Speers went to the union hall and met with Elder and Union President Charley Ford. They told Elder that he let them down and that they believed they could negotiate with management better without the Union and asked for a release. Elder then consulted with Ford and although they were of the view that they had negotiated a good contract they decided to accommodate the employee-members' wishes and disclaim interest. Thus by letter dated April 17 Elder wrote all five of the bargaining unit employees with a copy thereof to Respondent the body of which in its entirety reads as follows:

> Pursuant to our many phone conversations and after much soul searching on the part of the Officers of this Local Union, please be advised effective this date Teamsters Local Union No. 193 no longer desires to represent the unit certified by the N.L.R.B. November 4, 1980 in case #25-RC-7534.
>
> I feel that this Local Union has done all that is possible to be done in securing a Collective Bargaining Agreement and that any further negotiations would be fruitless because of your unreasonably high demands.
>
> Please be assured that if the Conkle Funeral Home should attempt to terminate you, we will process N.L.R.B. charges in your behalf.
>
> Should you have any questions please do not hesitate to contact me. [G.C. Exh. 4.]

According to the testimony of Grogg, Sexton, and Krugman, in late April or early May each of them separately had one conversation with Personnel Director Lashbrook where, *inter alia*, the subject of the Union had come up. Thus, Grogg testified that approximately a week after the Union's disclaimer letter, Lashbrook engaged him in conversation while the latter was working in the preparation room and during the course of a conversation told him, "You guys really messed up when you tried to go union. If you would have just come to me and talked to me about it, I would have tried to have done something about it for you." Sexton could not recall how the subject of the Union was broached but recalled Lashbrook asking him if he thought that the

[2] All dates hereinafter refer to 1981 unless otherwise indicated.

[3] There were approximately five or six employees in the bargaining unit at that time.

[4] The record discloses that the changes proposed by the employee-members were clearly substantive. Thus, the members proposed that the duration of the contract be 2 years rather than 1 year; a 50-cent-per-hour wage increase retroactive to the certification date for the first year of the contract and a 50-cent-per-hour wage increase for the second year of the agreement; that the company agree in writing to cooperate in providing sufficient hours to meet licensing requirements; and agreeing to eliminate subcontracting of embalming work which they were doing. It is not alleged nor contended that Respondent had engaged in surface or bad-faith bargaining.

[5] There is no evidence tending to show that the Union ever actually engaged in any picketing.

[6] *Grogg* was the Union's observer at the election and assisted the Union in the bargaining session.

Union had hurt the employees any. Lashbrook assertedly noted that if the employees had gone to management they could have resolved their problems such as scheduling and hours without the Union's help. Krugman testified that in May in a conversation with Lashbrook in the back hallway at the facility Lashbrook asked him whether he thought the employees would ever bring the Union back and he, Krugman, responded in the negative. Lashbrook assertedly then volunteered that if the employees brought the Union back one of them probably would not support the Union, to which Krugman assertedly made reference to Sexton and he, Lashbrook, confirmed the name. Lashbrook denied the substance of the aforenoted conversations except to the extent that he acknowledged telling employees that he wished they would have talked to him or to Assistant Manager Daniel Hayes before all this happened.

Sometime during the late April or early May time frame, Grogg again called Lutz and urged him to set an early date for direct negotiations with employees now that they had succeeded in eliminating the Union. Lutz again expressed doubt as to whether employees could legally rid themselves of the Union during the certification year and suggested that they let things "live for a couple of weeks."[7] Grogg solicited the support of Krugman and Sexton to enlist Lashbrook's assistance in setting up a meeting with them to negotiate. On June 30, Lashbrook summoned the four embalmers then employed, Krugman, Speers, Sexton, and Grogg, and advised them of a new working schedule and a wage increase.[8]

On August 5 Lashbrook sent Grogg home in the afternoon because business was slow and there was nothing for him to do. The following day because business was slow Grogg was again laid off as well as some of the other embalmers including the owner's son-in-law. Grogg then went to the union hall to explore with union officials the feasibility of filing unfair labor practice charges against Respondent for the layoff. The next day Grogg spoke to Sexton, Krugman, and Speers with regard to inviting the Union to represent them once again. Grogg was designated as the spokesperson to convey their desires to the Union. After this was accomplished, Elder, by letter dated August 7, wrote to Lashbrook as follows:

> Please be advised that Teamsters Local Union No. 193 wishes to reinitiate Collective-Bargaining for those employees who are members of Teamsters Local Union No. 193.
>
> We are willing to meet the earliest possible date, please advise me when the earliest possible date which you can meet. [G.C. Exh. 5.]

By letter dated August 12, Rayford Blankenship, a representative of Respondent, informed Elder that, because of the Union's previous disclaimer of interest, Respondent no longer recognized the Union as the employees' representative and suggested that they take the matter to the NLRB. In pertinent part the letter reads as follows:

> The Company believes there is no current question of representation due to your unequivocal disclaimer of interest, and we suggest that you take the matter to the NLRB.
>
> If you want to discuss the matter further, we will be glad to meet with you. However, we will not voluntarily recognize your continued majority status until the NLRB resolves these issues. [G.C. Exh. 6.]

On August 14, the Union filed the underlying charges which gave rise to this proceeding. On December 1, Blankenship, his assistant, Robert Craven, and Lashbrook called employees Speer and Krugman separately for interviews in preparation for hearing. Blankenship asked both employees in separate interviews for their cooperation stating, *inter alia*, that their participation was voluntary and promised no reprisals. In addition he gave them waivers reflecting what he had stated to them orally (see Resp. Exhs. 4 and 5). Blankenship told them that a complaint issued alleging certain misconduct by Lashbrook and asked them what they knew about these allegations and whether they had given statements to the Board. Both Speer and Krugman signed the waiver and, in Krugman's case, he also agreed to permit the taping of the interview.[9]

B. *Discussion and Conclusions*

1. The 8(a)(5) allegation

The principal facts are not in dispute. Thus the record disclosed, *inter alia*, that the Union was duly certified on November 4, 1980, but by mid-April 1981 it had lost virtually all support from unit employees. The employees' disaffection culminated in an unequivocal union disclaimer of interest in writing, a copy of which was sent to each unit employee and to Respondent. It is not contended, nor does the record disclose that the union disclaimer was predicated in whole or in part on any wrongdoing on the part of Respondent. On the contrary, the record disclosed that Respondent tried to dissuade employees from abandoning the Union during the certification year. In August, a little over 3-1/2 months following the union disclaimer, the former employee-members having met with no success in bargaining directly with the Company, then invited the Union to reinstitute bargaining on their behalf. The Union thereupon by letter dated August 7 wrote Respondent advising it that the Union "wishes to re-initiate collective bargaining for employee members." As noted previously, Respondent by letter dated April 12 refused to recognize and bargain relying

[7] *Grogg* acknowledged on cross-examination that when he first approached *Lutz* with regard to negotiating directly with employees without the Union, that the latter told him that it was unethical for him to discuss his union rights because he, *Lutz*, represented the Company. *Lutz* did not testify at the hearing.

[8] The changes in wages, hours, and working conditions on that occasion are not encompassed by the complaint nor does the General Counsel contend that they were unilateral changes in violation of Sec. 8(a)(5) or that they otherwise violated the Act.

[9] As noted previously the General Counsel contends that these interviews were coercive and violative of Sec. 8(a)(1) of the Act.

on the Union's earlier unequivocal disclaimer of interest. The certification year still had approximately 2 months and 3 weeks to run. The parties are in agreement that the total record factually presents a case of first impression.

It has been held that a certification achieved on the basis of a Board election must be honored for a reasonable period, normally 1 year absent unusual circumstances. See *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954); *Smith & Smith Aircraft Company*, 260 NLRB 1045 (1982); *WTOP, Inc.*, 114 NLRB 1236, 1237 (1955). By the time the Supreme Court treated the Board's rule with favor in *Ray Brooks*, "unusual circumstances" had been found in at least three situations: (1) dissolution or defunctness of the union; (2) schism, with substantially all the members and officers of the union transferring their affiliation to a new local or international; and (3) radical fluctuation in the unit complement within a short time. See *Ray Brooks* v. *N.L.R.B.*, *supra* at 989–999, and cases cited therein. On the other hand, it has been consistently held that the Union's loss of majority support by unit employees is not "unusual circumstances" as to justify a respondent's refusal to bargain within the certification year. See *Lee Office Equipment*, 226 NLRB 826, 831 (1976), enfd. 572 F.2d 704 (9th Cir. 1978); *Lexington Cartage Company, Inc.*, 259 NLRB 55 (1981); *Cocker Saw Company, Inc.*, 186 NLRB 893 (1970), enfd. 446 F.2d 870 (2d Cir. 1971); *Ray Brooks* v. *N.L.R.B.*, *supra.*

Applying the foregoing to the instant case, I find that the Union's intervening loss of majority support cannot be relied on as a defense for Respondent's refusal to bargain during the certification year. The question remaining is whether Respondent may rely on the Union's disclaimer in the total context of this case.

In *Ray Brooks*, Supreme Court cautioned against "self-help" during the certification year pointing out the accessibility of the Board's process for relief where an employer had doubt about the duty to continue bargaining (*supra* at 103). I find however that in the instant case noting the circumstances giving rise to the Union's disclaimer and that the Union engaged in no inconsistent action therewith for a substained period covering 3-1/2 months, that Respondent could safely treat the Union as defunct, at least insofar as Respondent's employees are concerned. See, e.g., *WTOP, Inc., supra.* In this connection it is noted, *inter alia*, that on or about June 30, approximately 2-1/2 months after the Union's disclaimer, Respondent made a number of unilateral changes in terms and conditions of employment including wage rates and scheduling without any challenge from the Union. In these circumstances, the fact that there was no new representation petition pending at the time the Union disclaimed (as was the case in *WTOP, Inc.*), it should not detract from the validity of the disclaimer, particularly where, as here, the union did not engage in any inconsistent action therewith for 3-1/2 months.[10]

[10] In *WTOP, Inc., supra*, where the certified union disclaimed after a representation petition was filed by another union during the certification year, the Board did not dismiss the petition as untimely stating that "it would not effectuate the policies of the Act to apply the 1 year certification rule in this case."

In assessing the events leading to the Union's disclaimer it is noted that Respondent was not accused nor does the record disclose that it failed to bargain in good faith. In fact, Respondent's final proposal was recommended by the union leadership as a "good contract."

As indicated previously, the fact that the membership rejected the proposal and decided to bypass and discard the Union and deal directly with Respondent may reflect employee disaffection with the Union, but by itself during the certification year it is of no consequence. However, the employees did much more than merely express disaffection; they requested a release from the Union and to ensure a complete break asked for and got an unequivocal disclaimer in writing. The Union in accommodating the employees by providing a written disclaimer did not fault Respondent but rather assessed responsibility for the falling out of the employees "because of [their] unreasonably high demands."

Under all the circumstances, noting that the Union's disclaimer was not in any manner attributable to Respondent and that the Union had not engaged in any inconsistent action for a sustained period of 3-1/2 months, I find that the Union could not then resurrect their bargaining status. As such, Respondent's refusal to recognize and reinstitute bargaining with the Union was based on special or unusual circumstances warranting a departure from the general rule of honoring a certification for 1 year. Accordingly, I shall dismiss their allegation.

2. The 8(a)(1) allegations

a. *Lashbrook's conduct*

Counsel for the General Counsel contends that in late April or early May, Lashbrook coercively interrogated Sexton and Krugman about their union sympathies and activities; intimated to Grogg and Krugman that he would adjust their grievances and improve benefits if employees abandoned their membership and support of the Union; and created the impression to Krugman that the employees' union activities were under surveillance; and that Respondent by such acts and conduct thereby independently violated Section 8(a)(1) of the Act.

While Lashbrook conceded that, after the Union disclaimed, the subject of the Union had come up in several brief conversations with employees, he denied that he interrogated them, or promised to adjust grievances and provide benefits if they abandoned the Union as well as denying largely the substance of the other remarks ascribed to him by Grogg, Sexton, and Krugman.

According to Lashbrook, and the record tends to support, the subject of the Union was touched upon only briefly while relaxing on break in the coffeeroom or, as in Grogg's case, a chance meeting in the preparation room.

Grogg testified that in late April, after the Union disclaimed, that Lashbrook told him in the preparation room, "you guys really messed up when you tried to go union. If you had just come to me and talked to me about it, I would have tried to do something about it for you." It is undisputed that Grogg volunteered his displeasure with the Union's inability to get more for em-

ployees citing Blankenship's skill in handling Elder and that Lashbrook agreed with Grogg's assessment of Blankenship. Nothing else was said, as they were joined in the preparation room by another employee. This was the only time Lashbrook ever mentioned the Union to Grogg.

Similarly, Lashbrook spoke on only one occasion with Sexton about the Union. According to Sexton, in late April, after the Union disclaimed, Lashbrook asked whether the Union had hurt him any, to which he responded, "[The Union] didn't help us any." Further, Lashbrook expressed surprise that the Union would go along with Respondent's management-rights provision and "suggested" that had employees gone to him or Assistant Manager Hayes first, they could have "solved the problems such as scheduling and hours without the Union's help." Lashbrook conceded only that he made reference to the management-rights provision and told Sexton that he wished he had come to him or Hayes before going to the Union. Sexton nor Lashbrook could recall how the subject of the Union entered the conversation. According to Krugman Lashbrook asked him on or about May 1 during a coffeebreak if he thought the employees would ever bring the Union back to which Krugman replied, "No, there is no way." To this, Lashbrook assertedly asked Krugman to let him know if the employees changed their thinking to again want the Union, but Krugman refused assertedly pointing out to Lashbrook that he is "management." Lashbrook denied any mention of the Union to Krugman.

I find for reasons noted below that under all the circumstances including credibility resolutions made in connection therewith,[11] that Lashbrook's remarks were isolated, free of coercion, and did not reach the level of 8(a)(1) misconduct as alleged.

[11] While *Lashbrook* and the General Counsel's witnesses *Grogg, Sexton,* and *Krugman* were all at times equivocal and had all exhibited poor recall, I find on balance that *Lashbrook* was more plausible and forthright than the General Counsel's witnesses. For example, it is noted that *Lashbrook* candidly responded to the Administrative Law Judge herein by admitting that he told *Sexton* that he wished that he had come to him or the assistant manager before he embraced the Union. By contrast, *Grogg* reluctantly acknowledged on cross-examination that *Lutz* told him that it was not ethical for him to discuss the union situation because he represented the Company. Further, in assessing *Grogg's* overall credibility, it is noted that despite being told by *Lutz* repeatedly that it was not lawful to bypass the Union and deal directly with employees during the certification year, *Grogg* refused to be deterred. Still further, *Grogg* tended to embellish his testimony and at one point was cautioned about not being responsive. With respect to *Sexton,* I found him, *inter alia,* unsure unless when asked leading questions by the General Counsel. It also appears that *Sexton's* testimony regarding his conversation with *Lashbrook* about the Union did not comport fully with his affidavit. Sexton asserted that, on checking his notes soon after giving the affidavit, he recognized that some changes had to be made, but he failed to notify the Board. I found *Krugman's* testimony largely inconsistent and implausible. For example, I find it incongruous and highly unlikely that he would on one hand tell *Lashbrook* that there was "no way" the employees would take the Union back, but if they decided to, he would refuse to tell *Lashbrook* because he, *Lashbrook,* was "management." Overall I found Krugman to be an unreliable witness noting, *inter alia,* his reluctance to identify his voice on tape and that his denials at the hearing regarding the questions asked by *Blankenship* at the interview on December 1 are largely contradicted by said tape. In sum, including my observation of the witnesses' demeanor I credit *Lashbrook* over *Grogg, Sexton,* and *Krugman* in all material respects.

First it is noted that from mid-September 1980, at which time the Union first appeared on the scene in an organizational capacity until it disclaimed interest in mid-April 1981, there is no evidence tending to show that Lashbrook or any other company official ever made reference to the Union in conversations with employees. Further there is a dearth of credible evidence tending to show that Respondent harbored union animus in conversations or otherwise at any time prior to the Union's disclaimer. On the contrary, Respondent fulfilled its bargaining responsibilities including the offer of a final proposal which the union leadership characterized as a "good contract." Further, the record disclosed that Respondent's attorney, Robert Lutz, time and again attempted to dissuade employees from dumping the Union pointing out that he had serious doubts that it could be done legally during the certification year.

The employees, however, rejected Lutz' advice and asked for and obtained a release from the Union in the form of a written disclaimer because they hoped with the Union gone that they could work out a better deal with Respondent. Thus, now that the Union was off their back, Grogg, as spokesman, admittedly instructed Krugman and Sexton to press Lashbrook about setting up meetings for direct negotiations with the employees. Given this backdrop, it is not surprising that Lashbrook told Sexton, "I wished [sic] before all this union thing happened that you would have talked to us." In any event I do not find that Lashbrook's statement conveyed a promise to "adjust employee grievances" or that he "offered improved benefits" if employees abandoned their membership and support of the Union, as alleged, particularly where, as here, the Union had already departed. Moreover, the statement did not carry any threat of reprisals. In this regard, it is noted that the record is devoid of any evidence tending to show that any employee was discriminated against because of union activties.

In sum, on the basis of the foregoing and in the total circumstances of this case, I am not persuaded that the General Counsel has established by a preponderance of the credible evidence that Lashbrook coercively interrogated employees, created the impression among employees that their union activities were under surveillance, and offered to adjust grievances and promised benefits to induce employees to abandon the Union as alleged. Accordingly, I shall recommend that these allegations be dismissed.

b. *Johnnie's Poultry allegation*

On December 1, employees Krugman and Speer were called to the preparation room where they were questioned separately by Blankenship about allegations including misconduct on the part of Lashbrook for the upcoming hearing. Blankenship's assistant, Robert Craven, and Lashbrook were present at the time the interviews were conducted.

Krugman was called in first and, after some preliminary introductions, Blankenship explained the purpose of the interview. Blankenship also told Krugman that his participation was voluntary, that he did not have to talk

to him, and stressed the fact that Krugman need not fear reprisals. As testified by Krugman, "I [Krugman] was told that this would [in] no way, shape or form jeopardize my job." Further, Blankenship asked Krugman whether he objected to having the interview taped and, although Krugman at first appeared unwilling, he relented when Blankenship again assured him against any reprisals. Blankenship then gave Krugman a waiver form and explained that the document stated in writing what Blankenship represented to him verbally.[12] Krugman signed the waiver form and then was questioned on tape about his knowledge concerning Lashbrook's alleged misconduct *vis-a-vis* surveillance, interrogation, and promise of benefits as set forth more fully in the complaint.[13] Blankenship once again assured Krugman that he need not fear reprisals; that his job was not in jeopardy.

Speer was interviewed shortly after Krugman. Essentially the same procedure was followed: First, introductions, followed by Blankenship's explanation that the purpose of the interview was to investigate allegations of misconduct on the part of Lashbrook for the upcoming hearing. Blankenship told Speer that he did not have to talk to him if he did not want to participate in the interview. He pointed out to Speer, however, that he could state anything he wanted to without fear of reprisals from him (Blankenship) or the Company. Speer at first stated that he did not feel like talking, but after it was pointed out that the inquiries were not directed at his conduct, but Lashbrook's, Speer was more amenable to conversation. Thus Speer signed the same waiver form (Resp. Exh. 4) as had Krugman, although Speer asserted that he had not read the document. He acknowledged, however, that Blankenship told him what the waiver form represented and was given the opportunity to read the document. Blankenship, with Speers' approval, then read the portions of the complaint pertaining to Lashbrook. Speer told Blankenship that he and Lashbrook never conversed on union matters and that he was unable otherwise to provide information regarding the allegations. At one point during the interview when Blankenship questioned Speer about Lashbrook allegedly conveying the impression of surveillance, Speer volunteered that he has always been a supporter of the Union. Blankenship told Speer that there was nothing wrong with supporting the Union and the interview ended a moment or two later.

The General Counsel contends that the interviews of Krugman and Speers on December 1 were coercively conducted as Blankenship assertedly failed to comport with the guidelines set forth by the Board in *Johnnie's Poultry.*[14] There the Board stated as follows:

> Despite the inherent danger of coercion therein, the Board and courts have held that where an employer has a legitimate cause to inquire, he may exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring Section 8(a)(1) liability. The purposes which the Board and courts have held legitimate are of two types: the verification of a union's claimed majority status to determine whether recognition should be extended, involved in the preceding discussion, and the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing the employer's defense for trial of the case.
>
> In allowing an employer the privilege of ascertaining the necessary facts from employees in these given circumstances, the Board and courts have established specific safeguards designed to minimize the coercive impact of such employer interrogation. Thus, the employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees. When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege.

In applying the foregoing guidelines to the instant case, I find, contrary to the General Counsel, that they were scrupulously observed. Thus the record disclosed and I find that Blankenship related to both Krugman and Speer that the NLRB had issued a complaint against Respondent alleging that Lashbrook had engaged in certain specified misconduct and that he, Blankenship, was now seeking information from them to help meet these allegations at the upcoming hearing. It is undisputed that Blankenship told Krugman and Speer that the interviews were voluntary and that he underscored the fact that no reprisals would be taken whether or not they agreed to participate therein. As noted previously, these safeguards were also memorialized in the waiver form signed by both Krugman and Speer.[15] Further, it is noted that while Krugman and Speer were not fully responsive at these interviews, that the record is devoid of any evidence tending to show that either of them suffered discriminatorily in the following 4-month period up to the date of the instant hearing.

[12] The waiver read as follows: "I Richard Krugman have been informed by Ray Blankenship or Robert Craven that I do not have to answer to any questions concerning Case 25-CA-13828, that I do so if I desire, that I may volunteer anything that I desire without fear of reprisals from the Company. Also, I understand that my job is in no way affected by my cooperation or lack thereof. Further, I do not feel coerced in the manner or the place of this interrogation, and I therefore make the following statements to be the truth to the best of my knowledge and belief." (Resp. Exh. 5.)

[13] *Blankenship* testified that he taped the interviews because "[It] is more accurate and its also a time consumption factor, to write out every question and then the man's *answer*."

[14] *Johnnie's Poultry Co.*, 146 NLRB 770, 774–775 (1964), enforcement denied on other grounds 344 F.2d 617 (8th Cir. 1965).

[15] See fn. 12, *supra.*

The General Counsel's reliance on *Tamper, Inc.*, 207 NLRB 907, 937 (1973), is misplaced. There unlike the instant case, Respondent failed to provide adequate assurances against reprisals and the interviews were conducted in a context of continuing antiunion hostility. Adding to the coercive nature of the interviews in *Tamper* is the fact that they were conducted in the "Board room," a room the employees had visited for the first time and familiar only to those individuals at the company possessing power. By contrast, in the case at hand, *inter alia*, Krugman and Speers as embalmers spend time working in the preparation room (where the instant interviews were conducted) daily. Insofar as Krugman and Speer were asked whether they had given affidavits to the Board, the question by itself has been held not to be coercive. See *Korwall Corporation of Indiana*, 238 NLRB 88, 90 (1978).[16]

In sum, I find in the total context of this case that the interviews were conducted in conformity with the guidelines set forth by the Board in *Johnnie's Poultry*. Accordingly, I shall dismiss this allegation.

CONCLUSIONS OF LAW

1. Respondent Conkle Funeral Home, Inc., is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Furniture, Department Store & Parcel Delivery Drivers & Warehousemen of Local Union No. 193, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not, as alleged, engage in conduct violative of Section 8(a)(5) and (1) of the Act.

4. Respondent did not, as alleged, independently engage in conduct violative of Section 8(a)(1) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The complaint is hereby dismissed in its entirety.

[16] As disclosed by the decision in *Kornwall*, Respondent's representative herein has not always scrupulously provided *Johnnie's Poultry* safeguards.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.